a

KIAN LUP CONSTRUCTION

v.

HONGKONG BANK MALAYSIA BHD

b

HIGH COURT MALAYA, TEMERLOH
RAMLY ALI J
[CIVIL SUIT NO: 22-5-1998]
31 MAY 2002

c ***TORT:*** *Defamation - Libel and slander - Ingredients - Proof - Closure of bank account - Closure communicated by letter - Whether statements in letter defamatory - Whether statements referred to plaintiff - Whether published to third party*

d ***TORT:*** *Defamation - Libel and slander - Qualified privilege - Closure of bank account - Whether bank liable - Closure effected in accordance with directive of Bank Negara Malaysia - Whether bank had legal duty to close account - Whether occasion privileged*

e ***BANKING:*** *Banker and customer - Current account - Relationship between bank and current account holder per se - Whether essentially contractual - Whether one of debtor and creditor - Whether involved fiduciary relationship - Closure of current account by bank - Whether in breach of fiduciary duty*

f The plaintiff, a business entity based in Gua Musang, Kelantan, had opened a current account with the defendant's branch in Raub, Pahang ('the account'). The account was operated by PW1, the sole proprietor of the plaintiff. The facts showed that, upon opening the account, the plaintiff was informed that the account was governed by guidelines known as "Customer's Guide to Revised Biro Maklumat Cek Operations" issued by Bank Negara Malaysia ('BNM BMC'). In essence, the BNM BMC made it mandatory for commercial banks like the defendant to close down those current accounts of their

g customers whom the BNM BMC had identified as cheque defaulters.

On 22 March 1996, the defendant's Raub branch discovered, from the data provided by BNM BMC, that the plaintiff was a cheque defaulter. In the event, by letter dated the same date ('the letter'), the defendant wrote to the plaintiff

h in Gua Musang requesting the plaintiff to close the account. PW1 could not understand English, and so, upon receiving the letter, showed same to his friends, including PW2, for assistance on the import of the letter. PW1 then approached the defendant's Raub branch where he was told that the account had to be closed as the plaintiff's name was highlighted in BNM BMC.

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Dissatisfied, the plaintiff sued the defendant for libel and slander, and alternatively for breach of fiduciary duty, claiming damages of RM3 million. Before the learned judge, the defendant *inter alia* argued that the plaintiff had no cause of action as the defendant had acted in good faith and had given prior notice before taking action. The primary questions that arose were: (i) whether the letter was defamatory in character, and if so whether it had been published by the defendant to a third party; and (ii) whether a fiduciary relationship existed between the parties, and if so, whether there was breach of fiduciary duty by the defendant.

Held:

[1] In a tort of defamation the plaintiff must prove three elements, namely the statement must bear defamatory imputations, must refer to the plaintiff's reputation and must have been published to a third person by the defendant. (p 41 a-b)

[2] Statements or words were defamatory if they tended to lower the plaintiff in the estimation of right-thinking men or if they would expose him to hatred, contempt or ridicule or cause him to be shunned or avoided. Before the words were said to be defamatory, the court must first look at the particular group in whose eyes the estimation of the plaintiff was lowered. The court would thus look at the words from the point view of the law abiding citizen or that of the ordinary, reasonable person or that of the right thinking members of society in general. (p 42 a-d)

[2a] Further, the court did not look at the actual effect of the allegations on the person's reputation or the meaning of the words actually understood or taken by listeners. In this respect, however, it is not enough that the listeners actually took the words as defamatory for they must be reasonably justified in so taking or understanding the words. (p 42 e)

[3] The plaintiff had failed to show that the letter was defamatory or had imputed that listeners would take the words therein in a defamatory sense. As matters stood, both PW1 and PW2 did not understand English and thus did not understand the contents of the letter. There was also no evidence that the letter was shown to or read by the plaintiff's employees or customers, and hence there was no publication of the letter to any third party by the defendant. If at all, publication was made by the plaintiff himself when he went around and showed the letter to PW2 and his friends. (pp 42 f-g & 45 f-h)

[4] The letter was addressed to Kian Lup Construction, namely the plaintiff, who was in Gua Musang, Kelantan. PW1, whilst being the sole proprietor of the firm, was known as "Aman" in Raub. On the facts, there was no indication that the people in Raub knew that one "Aman" was associated with Kian Lup Construction. There was hence no evidence that in the eyes of the people of Raub the letter was meant to refer to PW1 or the plaintiff. (p 44 f)

[5] The plaintiff had failed to demonstrate that the letter had defamatory imputations which referred to or reflected upon him or that the same had been published to a third party by the defendant. Clearly, the plaintiff had not discharged the burden cast upon him, had not established the necessary ingredients of defamation, and consequently had failed to establish any cause of action for defamation against the defendant. The plaintiff's claim, hence, must fail on this ground. (p 46 b-c)

[6] Assuming however that the plaintiff had established a cause of action in defamation, the facts remained that a privileged occasion was created when the defendant issued the letter. The letter was issued *bona fide* on information obtained from Bank Negara Malaysia, as the defendant was mandated to notify the plaintiff of the situation and take the necessary action in accordance with the requirement of BNM BMC. The defence of qualified privilege was clearly available to the defendant. (p 47 g-i)

[7] The plaintiff had only operated an account with the defendant and the latter did not act as an adviser to the former. That being so, no fiduciary relationship existed between them. Rather, the relationship that existed was purely contractual, *ie*, that of a debtor and a creditor. Accordingly, the plaintiff's alternative claim on this issue must also fail. (pp 52 h-i & 53 a)

[7a] Even if there was a fiduciary relationship between the plaintiff and the defendant, there was no breach of any duty by the defendant. The defendant had acted 'as what a reasonable man in a similar situation would do'. It was not the defendant's duty to see to it that the plaintiff's name was not in the BNM BMC's list, or that the information as relayed to it by BNM BMC was incorrect. On the other hand, it was the plaintiff's duty to make enquiries with Bank Negara Malaysia and effectuate the necessary rectification, if such information was untrue. (pp 54 b-d & 55 c-d)

[Claim dismissed.]

Case(s) referred to:

Abdul Rahman Abdul Karim v. Abdul Wahab Abdul Hamid [1996] 2 CLJ 455 ***(refd)***
Abdul Rahman Talib v. Seenivasagam & Anor [1965] 1 MLJ 142 ***(refd)***
Adam v. Ward [1917] AC 307 ***(refd)***
Alwee v. Lai Kong Fook & Ors [1980] 2 MLJ 258 ***(refd)***
Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 ***(foll)***
Cork v. Maclean Ltd [1952] 2 All ER 402 ***(refd)***
Foley v. Hill [1848] 2 HL Cos 28 ***(refd)***
Frame v. Smith [1987] 42 DLR (4th) 81 ***(refd)***
Glasgow Corporation v. Muir [1943] AC 448 ***(refd)***
Hebditch v. Macilwaine [1894] 2 QB 54 ***(refd)***
Hedley Byrne & Co Ltd v. Heller & Partner Ltd [1964] AC 165 ***(refd)***
Institute of Commercial Management, United Kingdom v. New Straits Times Press (Malaysia) Bhd [1993] 1 MLJ 408 ***(refd)***
JB Jeyaretnam v. Goh Chok Tong [1985] 1 MLJ 334 ***(refd)***
John Lee & Anor v. Henry Wong Jen Fook [1981] 1 MLJ 108 ***(refd)***
Knupffer v. London Express Newspaper Ltd [1944] AC 116 ***(refd)***
Lau Chee Kuan v. Chow Soong Seong & Ors [1955] 1 MLJ 21 ***(refd)***
Lee Kuan Yew v. JB Jeyaretnam [1982] 1 MLJ 239 ***(refd)***
Luk Kai Lam v. Sim Ai Leng [1978] 1 MLJ 214 ***(refd)***
S Pakianathan v. Jenni Ibrahim [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 ***(refd)***
SB Palmer v. AS Rajah & Ors [1949] MLJ 6 ***(refd)***
Syed Husin Ali v. Syarikat Percetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56 ***(refd)***
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors And Other Appeals [1997] 2 CLJ 607 ***(refd)***
The Straits Times Press (1975) Ltd v. The Workers' Party & Anor [1987] 1 MLJ 186 ***(refd)***
Yussoupoff v. Metro-Goldwyn-Mayer Pictures Ltd [1934] 50 TLR 58 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

Other source(s) referred to:

Gatley on Libel and Slander, 9th edn, pp 4, 6, 134, 138, 326, 666-668
Keith R Evans, *Law of Defamation in Singapore and Malaysia*, 2nd edn, pp 10, 40-41, 62, 70
Poh Chu Chai, *Law of Banking*, 2nd edn, pp 29-30

For the plaintiff - Mohd Nadzim Ibrahim (Rosal Azimin Ahmad); M/s Shamsuddin & Co
For the defendant - AS Vengadeswaran (Linda Kam); M/s Syarikat Kam Woon Wah

Reported by WA Sharif

JUDGMENT

Ramly Ali J:

The plaintiff, Kian Lup Construction, a business entity registered under the Business Registration Act 1956, filed the present suit against the defendant, Hongkong Bank Malaysia Berhad, for libel and slander and claiming damages not less than RM3,000,000 and/or for an amount to be assessed by the court and/or in the alternative, general as well as punitive damages for breach of fiduciary duty. The plaintiff had prior to the present suit, filed a writ summons *vide* Civil Suit No: 22-14-1996 which was struck out on preliminary issue and thereon filed a fresh suit ie, the present suit which is before the court now.

Facts Of The Case

The plaintiff, Kian Lup Construction is a business entity duly registered under the Business Registration Act 1956 and was set up in Gua Musang, Kelantan from 1995 to 1999. One Chong Won Chee (PW1) claimed to be the sole proprietor of the plaintiff. PW1 was born in Kelantan and started his construction business in Kelantan under the name of the plaintiff. PW1 has also four other companies registered in Kelantan which do not deal with construction business. PW1 come to Raub sometimes in 1995 to do construction work on Hotel Sri Raub and finished the contract in 1996 wherein all payment for this contract has been fully settled. Then in 1996, PW1 started work on a bungalow house and finished. The contract price had also been fully paid. Thereafter PW1 did not do any construction work in Raub. PW1 is known as "Aman", in Raub.

On 22 February 1995, the plaintiff opened a current account under the name of Kian Lup Construction with the defendant's Raub Branch. The current account opening form was executed and signed by PW1, (exh. P4). On 22 March 1996, the defendant's Raub Branch received the Global Closure on CUA customers report from the Bank's IT department of the Group Central Accounts Department in the Kuala Lumpur head office (exh. D5). The said CUA customers report lists out customers name, account number and ID, which has been matched by the defendant's computer system against "Bank Negara Malaysia Biro Maklumat Cek (BNM BMC)" data file contained in diskette form. This BNM BMC is based on information and data provided by all banks to Bank Negara Malaysia (BNM) as to cheque irregularities by banks customers. When the CUA customers report was received by the defendant's Raub branch, which highlighted the plaintiff's account, they checked details of the account on the report. The details checked were account number, account name and business registration number as against the plaintiff's opening account documents in the account pocket. As the above details confirmed and matched with the CUA customer report, the defendant's Raub branch, as

required by the BNM BMC guidelines issued the defendant's standard letter dated 22 March 1996 (exh. P2) to the plaintiff. The said letter is reproduced below:

Ref:

Kian Lup Construction
296, Kg. Baru
18300 Gua Musang, Kelantan.

22 MAR 1996

Tuan/Puan

YOUR CURRENT ACCOUNT NO: 365-125731-001

We note that your name has been reported in the Biro Maklumat Cek 'Blacklist'.

As such, as provided under the Biro Maklumat Cek Guidelines, we regret to inform you that we are required to close your account w.e.f. **8 April 1996.**

Please call on us with your unused cheque book (s) on or before **8 April 1996.**

If we do not hear from you by that date, we will nevertheless close your account and remit to you by Cashier's Order the balance less our charges to your last known address in our records.

Yang benar

t. t.
...
Pengurus

The above letter was issued in accordance with the requirements of BNM BMC guidelines, which requires mandatory closure of the current accounts of bad cheque offenders with all commercial banks in Malaysia in addition to the account in which the bad cheque is committed.

Once PW1 received the above letter, PW1 went to see his friend, Thian Yew Lin (PW2), to explain to PW1 the contents of the said letter. PW2, who did not know how to read English, together with PW1, brought and showed the letter to another friend – Ng Kok Meng (not called as witness). The said Ng Kok Meng told PW2 that the defendant's Raub branch sent the letter because PW1 was on the blacklist and the account would be closed.

On 5 April 1996, ie, one week after receiving the said letter, PW1 came over to the defendant's Raub branch together with two other friends namely Raymond Leong and Benson Lim Ah Heng. PW1 told Benson about the problem and showed him the said letter before going to the defendant's Raub branch. The defendant's officer Mrs. Ti Swee Ling (DW1) attended to PW1 and explained that his account was highlighted in the CUA customers report and in compliance with BNM BMC guidelines, the defendant had to close any account highlighted. DW1 further commented that the plaintiff's account with the defendant was in order and enquired if the plaintiff could recall whether any of his accounts with other banks which could have caused the blacklisting. DW1 also suggested to PW1 that if it was a wrong submission by his banker elsewhere, an amendment could be sent to BNM to withdraw his name from BNM BMC and then the defendant could allow the plaintiff's account to be retained and reinstated, whichever is appropriate.

PW1 left and came back in the afternoon to surrender his unused cheque book and requested to close the account. The said account closing form dated 5 April 1996 (exh. P3), was duly signed by PW1.

After that PW1 went to check with his other accounts at Gua Musang, Kelantan banks namely BBMB and MBB and found nothing was wrong. Then PW1 opened an account with OUB Raub and one week later ie, 16 April 1996 PW1 instructed his solicitors to issue a letter of demand to the defendant's Raub branch (exh. P10) which reads as follows:

> Your act of closing our client's account was without justifiable cause, arbitrarily, false and negligently done and had resulted in our client being ridiculed and made to suffer loses and business dealing. We therefore have instruction to proceed with court proceeding and to claim damages which will extend to the sum of at least RM3,000,000.00.

The defendant denied to the above facts *vide* their letter dated 2 May 1996 (exh. 7). On further instruction, DW1 rechecked the CUA customers report and the account records and found everything was in order. DW1 tried to contact PW1 to resolve the matter, but PW1 refused to come. The defendant's Raub branch stopped calling PW1 when they received the plaintiff's solicitors letter "to stop disturbing PW1".

The defendant is saying that PW1 was well aware of the BNM BMC guidelines on matter pertaining to bad cheque. The requirements were brought to PW1's attention when he opened up the account with the defendant's Raub branch, through pamphlet form "CUSTOMER'S GUIDELINE TO THE REVISED BIRO MAKLUMAT (BMC) OPERATIONS" effective 1 July 1994 (exh. D6) which provides, *inter alia*:

(6) Apakah akibat melakukan kesalahan cek "Tak Laku"?

Keatas cek yang dikeluarkan, bank akan melapurkan pesalah ke BMC dan akan mengambil tindakan sewajarnya untuk menutup akaunnya atau jika pesalah itu layak untuk disenaraikan akaun itu sebagai Akaun Khas, BMC akan mengedarkan nama 'senarai hitam' pesalah kepada bank-bank lain untuk ditutup akaun keseluruhan.

(7) Apa itu penutupan akaun "keseluruhan"?

Ia adalah mandatori dan penutup serentak akaun pesalah cek "Tak Laku" dengan bank-bank perdagangan di Malaysia sebagai tambahan kepada akaun dimana kesalahan cek "Tak Laku" diperlakukan. Pesalah dilarang untuk membuka sebarang akaun semasa yang baru dengan mana-mana bank dalam tempoh larangan.

It has also been highlighted in the opening of account form dated 27 February 1996 (exh. P4) especially at p. 2 item (5) wherein the plaintiff signed and acknowledge that:

(5) I/We have not been reported by any bank to Biro Maklumat Cek in the last six months. The bank would have the right to close the new account should my/our name/s appear in the "blacklist" the following months.

The defendant claimed that they have acted in good faith based on the BNM BMC guidelines and had given prior notice before taking any action and the plaintiff has voluntarily closed the account.

DW3, who is the Chief Information Officer as well as the Head of Information Covering System Development, Computer Operations and Telecommunication of the defendant's headquarters in Kuala Lumpur gave evidence as to how the BNM BMC operates. DW3 has this to say:

This information is generated based on the information input received from Bank Negara Malaysia and matched it with our internal records. Bank Negara Malaysia get this information from submission made by all the banks. If any of these banks had given wrong information to Bank Negara Malaysia, Bank Negara Malaysia would have sent the same information to us. This information from Bank Negara Malaysia come in the form of a disket. The disket, after being generated, would be returned back to Bank Negara Malaysia. BMC listing is to list those customer with 3 bad cheques which had bounced and dishonoured. We have cases where a particular bank has submitted wrong information to Bank Negara Malaysia and the information after matching with our records, we would inform the branch to contact the customer. There are cases where customers come back and told us that they have been wrongly listed. We cannot correct the information. We can only inform Bank Negara Malaysia. The customer has to contact Bank Negara Malaysia.

Issues Raised

The issues before this court are as follows:

A. Defamation

(i) whether the plaintiff has established the cause of action of defamation;

(ii) whether the letter dated 22 March 1996 issued by the defendant's Raub branch to the plaintiff has defamatory imputation which refers to the plaintiff and has been published to third party;

(iii) if so, is the defendant entitled to the defence of "Qualified Privilege".

B. Fiduciary Duty

(i) whether there is a fiduciary relationship between the plaintiff and the defendant;

(ii) whether there is any breach of this duty which caused damages to the plaintiff

C. Damages

(i) whether the plaintiff has suffered damages as a result of either of the above.

Applicable Law On Defamation

Defamation is committed when the defendant publishes to a third person words or matters containing untrue imputation against the reputation of the plaintiff. Liability for defamation is divided into two categories, that of libel and slander. If the publication is made in a permanent form or is broadcast or is part of a theatrical performance, it is libel if it is in some transient form or is conveyed by spoken words or gestures, it is slander. (see: *Gatley On Libel and Slander*, 9th edn at p. 6).

In *Ayob bin Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; ([1989] 1 CLJ (Rep) 321), his Lordship Mohamed Dzaiddin J (now CJ) has clearly laid down the necessary procedure in establishing claim for libel, when he said at p. 155 (p. 324):

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the Plaintiff to show (1) the words are defamatory; (2) the words refer to the Plaintiff; and (3) the words were published. Where a defence of qualified privilege is set up, as in the present case, the burden lies on the Defendant to prove that he made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the Plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged: *Rajagopal v. Rajan.*

In other words, the plaintiff must prove (3) elements of the tort of defamation, which are:

(i) the plaintiff must show that the statement bears defamatory imputations;

(ii) the statement must refer to or reflect upon the plaintiff's reputation; and

(iii) the statement must have been published to a third person by the defendant.

1. Defamatory Imputations

What is "defamatory imputation"?

There is no precise test applied to determine whether or not any given words are defamatory. His Lordship Mohamed Azmi J in the case of *Syed Husin Ali v. Syarikat Percetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 at p. 58, quoting *Gatley on Libel and Slander*, 6th edn, p. 4, stated the following:

> There is no wholly satisfactory definition of a defamatory imputation. Any imputation which may tend 'to lower the Plaintiff in the estimation of right-thinking members of society generally', 'to cut him off from society' or 'to expose him to hatred, contempt or ridicule', is defamatory of him. An imputation may be defamatory whether or not it is believed by those to whom it is published.

It was further quoted that:

> A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency.

There are several general formulations, expounded words have been found defamatory such as – if they tend to lower the plaintiff in the estimation of right-thinking men in general as in the case of *SB Palmer v. AS Rajah & Others* [1949] MLJ 6; or if they would expose him to hatred, contempt or ridicule as the case of *Abdul Rahman Talib v. Seenivasagam & Anor* [1965] 1 MLJ 142; or if the words cause him to be shunned or avoided as in the case of *Yussoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* [1934] 50 TLR 58 (CA).

Further, whether the words are defamatory lies in the nature of the statement in that it must have the tendency to effect the reputation of a person. Therefore the question arises in whose eyes must the words complained of have the tendency to affect the plaintiff's reputation. In the *Law of Defamation in Singapore and Malaysia,* 2nd edn by Keith R. Evans (at p. 10), it is stated that, in applying these various tests, the court must look to a particular control group that is, in whose eyes must the estimation of the plaintiff be lowered before the words are said to be defamatory. It has been said that the court will look at the words from the point of – the law abiding citizen as per Murray-Ansley CJ (S) in *Lau Chee Kuan v. Chow Soong Seong & Ors.* [1955] 1 MLJ 21 (at p. 22); that of the average thinking man, as per Mathew CJ in *Lau Chee Kuan v. Chow Soong Seong & Ors.* [1955] 1 MLJ 21 (at p. 22); that of the ordinary, reasonable person, as in the case of *JB Jeyaretnem v. Goh Chok Tong* [1985] 1 MLJ 334; that of right thinking members of society in general, as in the case of *Syed Husin Ali v. Syarikat Percetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 (at p. 58).

In determining the issue, this court does not look to the actual effect of the allegations on the person's reputation, or the meaning of the words actually understood or taken by the listeners. (see: *JB Jeyaretnam v. Goh Chok Tong* [1985] 1 MLJ 334.) It is not enough that the listeners actually take the words in a defamatory sense, for they must be reasonably justified in so understanding the words before they are found to be defamatory (see *The Straits Times Press (1975) Ltd. v. The Workers' Party & Anor* [1987] 1 MLJ 186).

In our present case, the plaintiff has failed to adduce evidence to show in what way or how the letter dated 22 March 1996 (exh. P2) is defamatory or even has imputed that the listeners/witnesses actually took the words in a defamatory sense, for they must be reasonably justified in so understanding the words before they can be said to be defamatory. It is quite clear from the evidence of PW1 and PW2 that both of them did not understand English, thus did not understand the contents of the said letter.

The only evidence adduced by the plaintiff is that the contents of the letter was explained to PW1 and PW2 by another friend, Ng Kok Meng (not called as witness), but then how far does this court know whether the said Ng Kok Meng even understood the contents of the letter in defamatory sense. The said Ng Kok Meng was not called as witness. What PW2 said about Ng's explaination on the contents of the letter is purely hearsay and therefore not admissible. At one stage of the hearing, the plaintiff's counsel has requested for a postponement to enable the plaintiff to bring the said Ng Kok Meng as a witness as his name has been mentioned by PW2 in his evidence. When

the case came up for continuation, the plaintiff has failed to call the said Ng Kok Meng but proceeded to close his case without mentioning a word about Ng Kok Meng. No reason was given why Ng Kok Meng cannot come to court to give evidence. It is only proper in the present circumstances that this court invoke the necessary presumption under s. 114(g) of the Evidence Act 1950 against the plaintiff (see *Abdul Rahman bin Abdul Karim v. Abdul Wahab bin Abdul Hamid* [1996] 2 CLJ 455).

There was also a complete deviation of PW1's oral evidence in court from the pleadings. Paragraph 4 of the plaintiff's statement of claim states:

> (4) Defendan telah menulis dan mengedarkan satu surat bertarikh 22hb. Mac, 1996 kepada Plaintif yang dialamatkan ke pejabat Plaintif serta telah dibuka dan dilihat oleh kakitangan dan pekerja-pekerja Plaintif serta pelanggan-pelanggan Plaintif yang berada di situ yang mengandungi perkataan serta perkara-perkara yang fitnah terhadap Plaintif dan atau yang boleh diertikan sebagai perkara-perkara yang tidak baik terhadap Plaintif secara peribadi dan sebagai sebuah firma.

PW1 when giving oral evidence before this court completely deviated from the pleading and stated that he received the letter dated 22 March 1996 and showed it to PW2 to explain the contents. There is no mention that the said letter was opened in front of the plaintiff's staff and employees as well as customers who were around the plaintiff's office at the material times.

In *Abdul Rahman bin Abdul Karim*'s case, his Lordship Abdul Malik Ishak J has said:

> Where a party in giving his oral evidence in Court deviates from his pleaded defence, then his account as narrated to the Court must surely be suspect.

Further, the case of *Alwee v. Lai Kong Fook & Ors.* [1980] 2 MLJ 258 also illustrates the same point of evidence not supporting allegations in the pleadings. The evidence of PW1 and PW2 is also conflicting. It was the evidence of PW1 that the letter dated 22 March 1996 was explained to him by PW2, whereas PW2's evidence is that he cannot read and understand English and saw one Ng Kok Meng (together with PW1) who explained the contents of the said letter to both of them. In view of the inconsistency and deviation from the pleadings, the creditability of PW1 and PW2 as believable witnesses is in question. In the circumstances, the court is satisfied that the plaintiff has failed to prove that the statements as contained in the defendant's letter dated 22 March 1996 bear any defamatory imputations.

2. Reference To Plaintiff's Reputation

Assuming the plaintiff has shown that the words bear some sort of defamatory imputation, he must then proceed to establish that the defamatory words or remarks in question were published of and concerning him. The statement must be capable of referring to the plaintiff or of identifying him.

On this point, the Privy Council in the case of *Knupffer v. London Express Newspaper Limited* [1944] AC 116, has this to say:

> It is an essential element of the cause of action for defamation that the words complained of should be punished "of the Plaintiff', where he is not named the test of this is whether the words would reasonably lead people acquainted with him to the conclusion that he was the person referred to. The question whether they did so in fact does not arise if they cannot in law be regarded as capable of referring to him.

In the case of *Institute of Commercial Management, United Kingdom v. New Straits Times Press (Malaysia) Bhd.* [1993] 1 MLJ 408, his Lordship Lim Beng Choon J has held:

> It is an essential element of the cause of action for defamation that the words complained of should be published 'of the Plaintiff'. The test which the Plaintiff has to furnish an answer to satisfy the Court is whether the words would reasonably in the circumstances lead persons acquainted with the Plaintiff to believe that he was the person referred to.

In our present case, the letter dated 22 March 1996 was addressed to Kian Lup Construction (the plaintiff) which was formed in Gua Musang Kelantan. PW1, who is the sole proprietor of the plaintiff was also born in Kelantan. PW1 come to Raub in 1995 and in his own words PW1 admitted that in Raub he is known as "Aman". There is no indication to show the people in Raub know that one "Aman" is associated with Kian Lup Construction. That being the case, there is no clear evidence to show that in the eyes of the people in Raub the said letter was meant to refer to the PW1 or the plaintiff.

3. Publication To A Third Person

The final element that the plaintiff must prove is that the words of which he complains have been published to any third party by the plaintiff. As stated by Lord Esher MR in the case of *Hebditch v. Macilwaine* [1894] 2 QB 54 (at p. 58):

> The material part of the cause of action in libel is not the writing, but the publication of the libel.

Publication means making defamatory matter known to some person other than of whom it is written or spoken. In the case of *S. Pakianathan v. Jenni Ibrahim* [1988] 1 CLJ 771; ([1988] 1 CLJ 233) at p. 776 (p. 238), the court held that:

> In order to constitute publication, the defamation matter must be published to a third party, and not simply to the Plaintiff. By publication it is meant the making known of defamatory matter after it has been written to some person other than the person of whom it is written. The uttering of a libel to the party libelled is no publication for the purpose of civil action. (citing *Wennhak v. Morgan* [1888] 20 QBD 635).

In *Gatley On Libel and Slander*, 9th edn at p. 134, the same principle is reiterated as follows:

> The fundamental principle is that the matter must be communicated to a third party in such manner as to be capable of conveying the defamatory imputation about the Plaintiff.

Further, it also appears to suggest that the plaintiff has to go a step further to prove that in order for there to be publication, it would seem that the statement must be made in a language which the third party can understand. Hence, if the words are spoken in Mandarin to the person defamed, and are overheard by someone who does not understand Mandarin, there is no publication. This appears from the comments of the Federal Court in *Luk Kai Lam v. Sim Ai Leng* [1978] 1 MLJ 214 (at p. 215), wherein the court discussed certain comments made by the judge below concerning one of a number of alleged publication.

In our present case, it is the evidence of PW1 himself that he received the letter dated 22 March 1996 (exh. P2) and did not understand the contents of the letter, he took the letter to show it to PW2, to enable PW2 to explain to him about the contents. (This publication was by the plaintiff (PW1) himself, not by the defendant). It is also the evidence of PW1 that he showed the letter to 'Benson Leong' and told him of the contents of the letter before they went to the defendant's Raub branch. (This publication also, was by PW1 himself, not by the defendant). It is also the evidence of PW1 and PW2 that they took the letter and showed it to one Ng Kok Meng to explain the contents (again this publication also was by PW1 himself, not by the defendant). There is also no evidence at all to show that the letter was read by the plaintiff's staff and employees or customers as alleged in the statement of claim. The only inevitable conclusion is that there is no publication to any third party by the defendant. As clearly illustrated in *Gatley on Libel and Slander*, 9th edn, at p. 138:

> As a general rule if A writes a letter to B defaming B (which is no publication) and B shows this to C there is no publication for which A is responsible for the publication is B's own act. (citing *Wilcox Moon 24a.244* (Vt. 1892) and *Shepherd v. Lamphier* 146 N.7 Supp. 745 [1914].

It is clear from the above considerations that the plaintiff has failed to discharge his burden of proof to establish all the necessary elements of defamation. The plaintiff has failed to establish the cause of action for the alleged defamation by the defendant. The plaintiff has failed to demonstrate that the letter dated 22 March 1996 (exh. P2) has defamatory imputations which refer to or reflect upon him and has been published to a third party by the defendant. On these grounds alone, the plaintiff's claim against the defendant for defamation can be dismissed with costs.

Defence Of Qualified Privilege

Assuming the plaintiff has established the cause of action against the defendant for defamation, the court shall now proceed to consider the defendant's defence of qualified privilege.

In *The Law of Defamation In Singapore and Malaysia*, 2nd edn by Keith R Evans (at p. 62) citing the case of *Abdul Rahman Talib v. Seenivasagam & Anor* [1965] 1 MLJ 142, it has been stated that:

> Qualified Privilege is a right limited to an individual who stands in such relation to the circumstances that he is entitled to say or write that which would be libellous on the part of any one else. A privilege occasion is one which the privileged person is entitled to say something which no one who is not within the privilege is entitled to say on that occasion.

It is a question of law as to whether an occasion is privileged, as the plea is raised in defence. The question whether the occasion on which the statement was made was a privileged one is a question for the judge and the defendant bears the burden of establishing the facts and circumstances necessary to create the privilege. If the judge rules that the occasion is privileged, then the plaintiff must, in order to succeed in the action, prove that the defendant was not using the occasion honestly for the purpose for which the law gave it to him, but was actuated by malice (see *Ayob bin Saud v. TS Sambanthamurthi (supra)* and *Gatley on Libel and Slander*, 9th edn at p. 326).

The categories of occasion which the law treats as privilege are extremely varied and do not exhaust in general principle of qualified privilege. In our present case, the defendant issued the letter dated 22 March 1996 (exh. P2) based on the information and data provided by all banks to Bank Negara Malaysia (BNM) as to cheque irregularities by banks customers where the name of the plaintiff was highlighted.

The said letter was issued in accordance with the requirements of BNM BMC guidelines of "Customer's Guide to Revised Biro Maklumat Cek (BMC) Operations, effective from 1 July 1994" (particularly item (6) and (7) as highlighted above), which requires mandatory closure of the current accounts of bad cheque offenders with all commercial banks in Malaysia in addition to the account which the bad cheque is committed. Further it is also highlighted in the opening of the account form dated 27 February 1995 (exh. P4) especially p. 2, item (5) wherein the plaintiff signed and acknowledged (as highlighted earlier).

Lord Atkinson in the case of *Adam v. Ward* [1917] AC 307 at p. 334, stated:

> A privileged occasion ... is an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

The above case was referred to by the Federal Court in *John Lee & Anor v. Henry Wong Jen Fook* [1981] 1 MLJ 108, where it was held that:

> Where a statement made by a person having a legal duty to make it and the recipient has a corresponding interest or duty to receive it, such communication is privileged.

Another form of statement which is privileged is statement made in protection of self interest. It is said at p. 70, of *The Law of Defamation In Singapore and Malaysia*, 2nd edn, by Keith R Evans, statements, although defamatory and not true, may be subject to qualified privilege if the defendant can show that they were made in the conduct of its affair, in the protection of his own interest as long as the statements are relevant to the subject matter in question, provided the statements are made *bona fide* and are fairly relevant to the accusations made against that person (citing the case of *Lee Kuan Yew v. JB Jeyaretnam* [1982] 1 MLJ 239).

It is clear from the above authorities and the facts of the present case, that a privileged occasion is created when the defendant issued the letter dated 22 March 1996 (exh. P2) to the plaintiff. The plaintiff has failed to prove that the defendant was not using the privileged occasion honestly for the purpose for which it was given and was actuated by malice. The plaintiff has also failed to establish malice or the part of the defendant. The letter was issued *bona fide* based on the information obtained from Bank Negara Malaysia and it is a mandatory requirement to let the plaintiff know of this fact and for the defendant to take all the necessary action following this information. Therefore, the court is satisfied that a defence of qualified privilege is applicable in the present case.

Damages In Relation To Defamation

The plaintiff is claiming damages for libel for an amount not less than RM3,000,000 or an amount to be assessed by the court. In *Gatley On Libel and Slander*, 9th edn (at pp. 666-668), it is stated that in an action for libel if the plaintiff claims to have suffered an injury going beyond the normal damages which is presumed to follow in the ordinary course of defamatory publication, he must give particulars of facts and matters relied upon in support of the claim, including details of any conduct by the defendant which has increased the loss suffered and of any loss which is peculiar to the plaintiff's own circumstances. Where the plaintiff claims to have suffered financial loss, he must allege such damages, including a general falling-off business, otherwise he will not be able to give evidence of such damages at the trial. As for slander, as a general rule an action in slander is not maintainable unless there is proof of special damages. Particulars of such loss must be set forth in the pleadings. Failure to prove special damages will cause the action to fail (see *The Law of Defamation In Singapore and Malaysia*, 2nd edn by Keith R. Evans at pp. 40-41).

In the present case, in para. 9 of the statement of claim, the plaintiff alleged that as a result of the defendant's conduct in issuing the said letter dated 22 March 1996, which the plaintiff claimed to be defamatory, the plaintiff has suffered damages. The details of the damages suffered as follows:

> 9. Perbuatan Defendan itu telah menyebabkan Plaintiff mengalami kerugian serta tercemar nama baik terutamanya dikalangan hubungan perniagaan Plaintif serta masyarakat. Butir-butir kerugian dan kejejasan nama baik Plaintif adalah seperti berikut:
>
> **BUTIR-BUTIR KERUGIAN**
>
> (a) Kecemaran atau kerosakan nama baik Plaintif sebagai ahli perniagaan yang jujur;
>
> (b) Plaintif kehilangan peluang untuk memasuki urusan-urusan perniagaan yang lain dengan rakan-rakan perniagaan atau pihak ketiga oleh kerana perbuatan fitnah Defendan itu;
>
> (c) Rakan perniagaan Plaintif menjadi curiga terhadap kewibawaan Plaintif menjalankan perniagaan serta mengendalikan urusan dengan bank dan lain-lain urusan kewangan;
>
> (d) Pelanggan dan rakan perniagaan Plaintif tidak mahu berurusan dengan Plaintif secara menggunakan cek lagi;
>
> (e) Cek-cek Plaintif dengan akaun bank yang lain juga tidak mahu diterima oleh pelanggan dan sesiapa juga oleh kerana firma Plaintif adalah dikatakan oleh Defendan dalam senarai hitam;

(f) Plaintif tidak dapat menerima bayaran melalui bank lagi walaupun pelanggan Plaintif telah berjanji untuk berbuat demikian;

(g) Plaintif terpaksa menjalankan urusan-urusan perniagaan secara tunai dan juga terpaksa meminta pelanggan dan rakan perniagaan yang lain membuat bayaran secara tunai juga dan ini amat menyulitkan;

(h) Plaintif terpaksa mengambil tindakan undang-undang ini untuk membersihkan nama baik Plaintif dan terpaksa mengeluarkan bayaran guaman yang tidak sepatutnya berlaku tanpa perbuatan Defendan itu.

The plaintiff has made detailed allegations of damages suffered as a result of the so called defamatory letter issued by the defendant, in the statement of claim. Based on the authorities cited above the plaintiff must adduce evidence during trial, to prove all the allegations made in the statement of claim, otherwise the claim must fail. Surprisingly, the plaintiff has not adduced any evidence, not a single shred of evidence, to prove any of those allegations. There is no mention at all by PW1 as well as PW2 about the alleged damages suffered by the plaintiff, through out the hearing. PW1's evidence has not touched anything on the issue of damages. There is not a single line of evidence from PW1 to say that the plaintiff or himself has suffered any damages as detailed out in the statement of claim. The plaintiff's counsel has not asked PW1 or PW2 anything on the question of damages throughout the hearing. From the details of the alleged damages in the statement of claim, it seems that the plaintiff is claiming to have suffered damages going beyond the normal damages which is presumed to follow in the ordinary course of the defamatory publication, and therefore all the allegations must be proved by evidence. Failure to do so will cause the action to fall.

In any event, the question of damages only arises when the plaintiff has proved or established its cause of action for the alleged defamation by the defendant. In this case, the court has concluded earlier that the plaintiff has failed to do so. Therefore the question of damages in relation to defamation need not go further.

Alternative Claim On Breach Of Fiduciary Duty

In the alternative, the plaintiff is claiming for damages suffered as a result of a 'breach of fiduciary duty' on part of the defendant as a financial institution towards the plaintiff. Paragraph 10 of the statement of claim states as follows:

10. Secara bersekali dan secara alternatifnya Plaintif juga menuntut gantirugi untuk "Breach of Fiduciary Duty" terhadap Defendan sebagai sebuah institusi kewangan yang Defendan telah mungkiri apabila Defendan gagal melaksanakan "the required duty of care" terhadap Plaintif yang menjadi pemegang akaun di Bank Defendan.

BUTIR-BUTIR PELANGGARAN DUTY OF CARE

(a) Gagal mempastikan secara positif bahawa sebenarnya nama firma Plaintif tidak ada dalam senarai hitam Biro Maklumat Cek;

(b) Membenarkan pegawai, ejen dan/atau kakitangannya mengeluarkan surat bertarikh 22hb. Mac 1996 tanpa mendapatkan fakta dan maklumat yang sah benar dan tepat;

(c) Membenarkan pegawai, ejen dan/atau kakitangannya menghebahkan serta memberitahu kepada pihak ketiga tentang kedudukan kewangan firma Plaintif berdasarkan kepada fakta dan maklumat yang salah dan tidak tepat;

(d) Gagal mematuhi peraturan-peraturan undang-undang Akta Bank dan Institusi Kewangan;

(e) Membenarkan pegawai, ejen dan/atau kakitangannya menghubungi Plaintif dan rakan-rakan beliau di Raub, Pahang diantara lainnya Thian Yew Lin untuk hadir berjumpa dengan Pengurus Defendan iaitu Lee Chin Eng secara membelakangkan peguamcara Plaintif untuk memujuk Plaintif supaya jangan mengambil tindakan guaman terhadap Defendan.

The first issue to be decided by this court is whether the relationship between the plaintiff and the defendant is fiduciary.

In the case of *Tengku Abdullah Ibni Sultan Abu Bakar & Ors. v. Mohd. Latiff bin Shah Mohd and Other Appeals* [1997] 2 CLJ 607, the Court of Appeal has discussed in depth as to fiduciary duty. At p. 635, the Court of Appeal has this to say:

> Suffice to say that the jurisprudence that was originally applied to trustees and beneficiaries *stricto sensu* was, over a period of time, extended on a case by case basis to other relationships akin to a trust. It is this latter category that came to be known as a fiduciary relationship.

It was held in that case that the categories of fiduciary relations are never closed. Whether a particular set of circumstances ought to attract a fiduciary duty is a question of judicial policy. It depends upon the standard of commercial morality that the courts of a particular jurisdiction may choose to impose upon parties to a transaction, having regard to the cultural background and circumstances of the society in which they function. At pp. 641-642, Gopal Sri Ram JCA, citing *Frame v. Smith* [1987] 42 DLR (4th.) 81, quoting Wilson J on the primary characteristic of a fiduciary relationship, has said:

> Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent. Relationship in which a fiduciary obligation have been imposed seems to possess three general characteristics:
>
> (1) the fiduciary has scope for the exercise of some discretion or power;
>
> (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interest;
>
> (3) the beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.

In the present case, the defendant is a banker and the plaintiff is a customer. The plaintiff maintained a current account no: 365-125731-001 with the defendant's Raub branch. By operating a current account with a banker, the customer is depositing his money with the banker and the banker is liable to pay the money deposited when demanded or instructed by the customer by way of issuing a cheque. The characteristics of the banker and customer relationship were first highlighted by the House of Lords in *Foley v. Hill* [1848] 2 HL Cos. 28. It was decided by their Lordships that the relationship between a banker and his customer was essentially one of a debtor and creditor and not one of trusteeship. This decision was affirmed on the ground that there was no fiduciary relationship between a banker and his customer to warrant a suit in equity. Their Lordships were of the view that the relationship was contractual. As Lord Brougham has put it:

> I cannot at all confound the situation of a banker with that of a trustee and cannot conclude that the banker is a debtor with a fiduciary character.

The above extract can be found at *Law of Banking*, 2nd edn by Poh Chu Chai at pp. 29-30.

Generally, banking institution provides a number of basic financial and advisory services to customers, namely:

(1) traditional banking facility where customers deposit their moneys with the bank and the bank is liable to repay the money when demanded or instructed by the customer (as in the present case). These services are provided by operating a current account or savings account with the bank.

(2) financial and advisory services where the bank is appointed by the customer to be the customer's advisor on matters relating to financial and advisory services. Usually these services are in addition to the first traditional services stated above.

(3) financial facility where the bank provide loan or other financial facilities to customers such as overdraft facilities. In this category, the bank is a lender and the customer is a borrower.

In the first instance, the relationship between the bank and the customer is one of a debtor and a creditor. The bank is the debtor and the customer is the creditor. For the second instance, the relationship between the bank and the customer is a fiduciary relationship. This was decided in *Hedley Byrne & Co. Ltd. v. Heller & Partner Ltd.* [1964] AC 165 where Lord Devlin has stated that, "there should be a special relationship between parties which imposed a duty to give careful advice." In that case, the court went on to say that the special relationship is recognised as having four characteristics, namely:

(1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the advisor at the time when the advice is given;

(2) the advisor knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertained class, in order that it should be used by the advisee for that purpose;

(3) it is known, either actually or inferentially, that the advice so communicated is likely to be acted by the advisee for that purpose without independent inquiry; and

(4) it is so acted upon the advisee to his detriment.

As for the third instance, ie, where the bank provides loan or financial facility to the customer, the relationship is also one of a debtor and a creditor. In this case, the bank is a creditor (lender) and the customer is a debtor (borrower). From the above three scenarios, only the second instances involve a fiduciary relationship between the bank and the customer, while the first and third instances, the relationship between them is merely contractual, ie, only as debtor and creditor, not fiduciary.

The fact of the present case does not warrant the relationship as fiduciary. The plaintiff operated a current account with the defendant. Therefore the relationship is merely contractual ie, that of a debtor and creditor, not fiduciary. The defendant issued the letter dated 22 March 1996 to the plaintiff based on the information obtained from Bank Negara Malaysia under the BNM BMC for the Global Closure on CUA Customers Report. The defendant is duty bound to issue such letter under the circumstances. As required by Bank Negara Malaysia, the defendant was to instruct the plaintiff to close the account with the defendant. The letter was sent to the plaintiff directly. It is not a

case where the defendant is giving, some form of "advice" as stated in *Hedley Byrne*'s case. Therefore, the question of fiduciary relationship does not arise. The plaintiff's alternative claim on this issue can be dismissed.

Breach Of Fiduciary Duty

In the event the court is wrong in coming to the above conclusion about fiduciary relationship and assuming the plaintiff has established a fiduciary relationship between them, the next point for the court to consider is whether there is any breach of that fiduciary duty.

In *Glasgow Corporation v. Muir* [1943] AC 448 at p. 457 Lord Macmillan has said the followings:

> All things are possible, and indeed, it has become proverbial that the unexpected always happens, but, while the precept *altrum non laedare* requires us to abstain from intentionally injuring others, it does not impose liability for every injury which our conduct may occasion ... . Legal liability is limited to those consequences of our act which a reasonable man of ordinary intelligence and experience so acting would have in contemplation. The duty of care as I essayed to formulate it in *Burhill v. Young* is a duty to avoid doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed ... . The standard of foresight of the reasonable man, is in one sense, an impersonal test ... . It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly the party sought to be made liable ought to have foreseen.

In the present case, the plaintiff has listed out five particulars of breach of duty of care on part of the defendant as appeared in para. 10 of the statement of claim.

Firstly, the plaintiff alleged that the defendant has failed to ensure positively that the plaintiff's name was not in the BNM BMC list. The court is of the view that this allegation cannot hold water. The defendant has acted 'as what a reasonable man in a similar situation would do.' The BNM BMC information is generated based on the information input received from Bank Negara Malaysia and what the defendant has to do is to match it with their own internal records. Bank Negara Malaysia obtained the information from submission made by all the banks in Malaysia. If any of these banks had given wrong information to Bank Negara Malaysia, Bank Negara Malaysia would have sent the same information to the defendant. This information from Bank Negara Malaysia come in the form of a disket. The disket, after being generated, would be returned to Bank Negara Malaysia. In fact DW3 has admitted in his evidence that there are cases where a particular bank has

submitted wrong information to Bank Negara Malaysia and the information after being matched with their records, the defendant would inform the customer. There are cases where the customers came back and told the defendant that they have been wrongly listed. The defendant cannot correct the information. The defendant can only inform Bank Negara Malaysia. The customer has to contact Bank Negara Malaysia.

The second allegation made by the plaintiff is that the defendant had issued the letter dated 22 March 1996 without having obtained the correct information relating to the matter in question. Again, this allegation is without merit. The information (BNM BMC information) was obtained from Bank Negara Malaysia in the form of a disket, based on information submitted by all the banks in Malaysia relating to customer's cheque irregularities. If the information is found to be not true then it is the customer's duty to contact Bank Negara to get it rectified. The defendant may rely on the information received from Bank Negara Malaysia. It is not the defendant's duty to enquire more into the information before taking the necessary step to issue the letter as required by the BNM BMC system. The procedure has been set in the system which was implemented since 1 July 1994 (exh. D6). It is only reasonable to expect the defendant to rely on the system.

The third allegation is that the defendant has published to a third party about the financial position of the plaintiff through the said letter dated 22 March 1996. Again the court cannot accept this allegation. The evidence on this issue is crystal clear in this case. The said letter was addressed to the plaintiff (Kian Lup Construction) at the given address in Gua Musang Kelantan. It was received by PW1 – as the sole proprietor of the firm. There is no evidence at all to show that this letter was received and opened by or in the presence of the plaintiff's employees or customers. The only other persons who knew about the contents of the letter were PW2, PW1's friend one Ng Kok Meng (not called as witness) and another friend of PW1 by the name of "Benson" who accompanied PW1 to the defendant's Raub branch on 5 April 1996. It was PW1 himself who went around showing the letter and telling third parties as to the contents of the letter, not the defendant.

Fourthly, the plaintiff also alleged that the defendant has failed to comply with the provisions of the Banking and Financial Institution Act (BAFIA) 1989. This allegation is just like a wild guess made by the plaintiff. The plaintiff has not followed with any evidence or submission to substantiate this allegation. Therefore it is not worth considering. In fact, by issuing the said letter dated 22 March 1996 to the plaintiff, the defendant is complying religiously with the relevant rules issued by Bank Negara Malaysia.

Finally, the plaintiff complained that the defendant tried to contact PW1 after receiving the plaintiff's solicitors letter dated 16 April 1996, directly without going through it's solicitors. The court did not see anything legally wrong when the defendant tried to contact PW1 directly without going through his solicitors on this matter. It is clear from the defendant's evidence that when they received the letter dated 16 April 1996 from the plaintiff's solicitors, the defendant was puzzled as their records showed no such wrongful closure as alleged in the said letter. DW2 then instructed DW1 to contact and to find out from the plaintiff or PW1, as to what was the reason for the plaintiff's solicitors letter being issued. PW1 personally in his evidence did not mention about the fact that the defendant's officer had called him without going through his solicitors. This issue was never raised at all during the plaintiff's case.

On all the evidence adduced, the court is satisfied that the defendant has not committed any breach of duty as alleged by the plaintiff.

Causation & Damages For Breach Of Duty

Assuming the defendant had breached the fiduciary duty, the question now is whether the defendant's breach of duty has in fact caused damages to the plaintiff. The plaintiff must prove that as a result of the breach of duty by the defendant, the plaintiff has suffered damages. In the case of *Cork v. Maclean Ltd.* [1952] All ER 402 (at p. 407), Lord Denning LJ has said:

> Subject to the question of remoteness, causation is, I think, a question of fact. If you can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage, but if can say that the damage would have happened just the same, fault or no fault, then the fault is not the cause of the damage.

In our present case, in the first place, the plaintiff has not adduced any evidence at all to show what damages the plaintiff has suffered as a result of the issuance of the letter dated 22 March 1996 by the defendant. PW1's evidence did not show that the plaintiff has suffered any loss. PW1 has failed to substantiate with evidence all the particulars of damages as listed under para. 9 of the statement of claim. Not even a single evidence. The plaintiff's counsel has not asked any question relating to this issue on both the plaintiff's withesses, PW1 and PW2. PW1, in his evidence admitted that he has completed all the construction projects in Raub which were undertaken by the plaintiff and all moneys due were fully paid. In fact PW1 also admitted that the plaintiff has opened up a new current account with OUB Bank in Raub without any problem about one week after the plaintiff's account with the defendant was closed on 5 April 1996. Other than that, PW1 has not mentioned anything about any loss suffered by the plaintiff, in his evidence. Therefore there is no evidence to suggest that the said breach of duty (if any) has caused any damage to the plaintiff.

Creditability Of Plaintiff's Witnesses

The plaintiff has called two witnesses namely PW1 and PW2. PW1 is the sole proprietor of the plaintiff and the main witness for the plaintiff's case. While PW2 is a friend of PW1 who was called to testify about the contents of the letter dated 22 March 1996. The court has seen their demeanour while giving evidence. There are also material contradictions and inconsistencies in their evidence which led the court to treat their evidence with suspicion. The court has to treat their evidence with caution.

In the first part of his cross-examination, PW1 said that after the account with the defendant has been closed, he had requested that the account be reopened and asked why the account was closed. At p. 8 of the notes of evidence, PW1 said:

> Setelah akaun saya ditutup saya ada minta buka akaun semula dan tanya apa sebab akaun saya ditutup.

The account was closed on 5 April 1996. On 16 April 1996, the plaintiff's solicitors wrote a letter of demand to the defendant. With the above statement, it means that PW1 had approached the defendant after 5 April 1996 to request the account to be reopened. However, on further being cross-examined, PW1 said:

> Antara 5/4/1996 hingga 16/4/1996 saya tidak pergi jumpa Hongkong Bank lagi. Setelah Hongkong Bank terima surat daripada peguam saya, barulah Hongkong Bank minta saya jumpa mereka.

This is a clear inconsistency in PW1's evidence. It is a material inconsistency during his cross-examination. The plaintiff's counsel should have re-examined PW1 on this inconsistency to establish the truth. But, he failed to do so. PW1 was not asked anything on that issue during re-examination.

There are also material contradictions between the evidence of PW1 and the PW2. In his evidence, PW1 said as follows:

> Bila saya terima ini surat, lepas itu saya pergi jumpa kawan saya sebab saya tak faham. Nama kawan saya ialah Thian Yew Lin. Thian Yew Lin cakap bank sudah blacklist saya. Jadi saya terus pergi jumpa bank, tanya apa sebab.

During cross-examination, PW1 said:

> Bila terima surat ini saya terus jumpa Encik Thian Yew Lin, Encik Thian Yew Lin tengok surat ini dan cakap saya telah diblacklist oleh Bank.

There is no mention about one Ng Kok Meng. However, Thian Yew Lin (PW2) in his examination-in-chief said:

> Chong (PW1) ada tunjuk ini surat kepada saya. Saya sama dia pergi cari satu kawan untuk tengok ini surat. Saya ada beritahu isi surat ini kepada Chong. Itu kawan nama Ng Kok Meng. Tak ada nama lain.

In his cross-examination, PW2 said:

> Saya tak pandai baca surat ini. Saya ada tunjuk surat ini kepada Ng Kok Meng. Saya bersama dengan Chong. Ng beritahu ini surat bank hantar sebab blacklist dan akaun akan ditutup. Ini surat saya bersama Chong (PW1) bawa jumpa Ng.

Another material contradiction between the evidence of PW1 and PW2 is in respect of PW1's visit to the bank after receiving the said letter. According to PW1, in his examination-in-chief:

> Thian Yew Lin cakap bank sudah blacklist saya. Jadi saya terus pergi jumpa bank tanya apa sebab.

In his cross-examination, PW1 said:

> Saya tak ingat saya pergi bank waktu pagi atau tengahari. Saya pergi dengan kawan Raub. Nama tak ingat. Tapi panggil 'Benson'. Hanya dengan Benson sahaja, tak ada orang lain. Saya ajak Benson sebab hari itu saya ada bersama Benson. Saya panggil dia sekali pergi.

However, PW2 in his examination-in-chief said:

> Saya pergi bank sama dia (PW1) tapi saya tak masuk bank. Ng Kok Meng tak pergi.

At the bank, PW1 met DW1. DW1 in her examination-in-chief (by way of witness statements) said that PW1 come to see her with two friends: Raymond Leong and Benson Lim Ah Heng. The plaintiff's counsel did not cross-examine DW1 on this issue. In the circumstances, DW1's evidence in this issue is left unchallenged. The effect is that creditability of PW1 and PW2 is really in question.

PW2's evidence must also be treated with suspect and great caution. If is demeanour in giving evidence seems to suggest that he is an interested party. The way how PW2 answered questions during the hearing seems to indicate that he is too biased against the defendant. In his cross-examination PW2 admitted that he has two accounts with the defendant: one personal account and the other is under his company's name. Under cross-examination he said:

> Saya sendiri ada akaun di HSBC. Saga tak ingat bila saya buka akaun tersebut. Sudah lama. Saya tak ada masaalah dengan akaun saya di HSBC. Saya buka personel account dan current account. Current account di bawah nama Syarikat, Persendirian ada satu akaun. Sekarang akaun syarikat masih lagi dibuka. Company account saya tak ada masaalah dengan bank.

However, in DW1's evidence, she said:

> I have known him (PW2) since 1989/1990. He is one of our account holders and we used to meet each other in the golf course. Thean's current account with us was closed by the bank for unsatisfactory conduct in June 1995.

This evidence of DW1 was not challenged at all by the plaintiff. The plaintiff's counsel has not cross-examined her on this issue. That being the case, and in view of the fact that PW2's account with the defendant was closed in 1995 due to 'unsatisfactory conduct', it gives strong justification for the court to treat PW2's evidence with suspicion and with great caution.

All those contradictions and inconsistencies would obviously affect the creditability of both PW1 and PW2, and therefore would adversely affect the plaintiff's case, on the balance of probabilities.

Conclusion

From all the above fact of evidence and law, the court is satisfied that the plaintiff has failed to establish his case either for defamation or breach of fiduciary duty. The plaintiff has also failed to establish any damage suffered by the plaintiff as a result of the alleged defamation or breach of fiduciary duty. Therefore, the plaintiff's claim against the defendant is dismissed with costs.